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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. LUIS M. BORREGO, SR., Appellant.	2 CA-CR 2008-0141 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF GREENLEE COUNTY

Cause No. CR-2007061

Honorable Monica Stauffer, Judge

AFFIRMED IN PART; VACATED IN PART

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E C K E R S T R O M, Presiding Judge.

¶1 After a bench trial, the court found appellant Luis Borrego, Sr., guilty of possession of marijuana for sale and transportation of marijuana for sale. The court sentenced him to concurrent, presumptive prison terms of five years on each count and ordered him to pay fines and surcharges of $270,000. On appeal, Borrego argues the trial court erred in denying his motion to suppress evidence obtained from his vehicle after a traffic stop. We vacate his conviction and sentence for possession of marijuana for sale but otherwise affirm for the reasons set forth below.

Factual and Procedural Background

¶2 In reviewing a trial court's ruling on a motion to suppress, we consider only the evidence presented at the suppression hearing, which we view in the light most favorable to sustaining the ruling. *State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007).

¶3 On August 23, 2007, Arizona Department of Public Safety (DPS) Officer McSpaddin stopped a Ford pickup truck that was speeding on U.S. Highway 191. At the officer's request, Borrego, who was the driver and sole occupant of the vehicle, produced an expired insurance document and a Virginia driver's license and registration. The truck had a Virginia license plate, but the vehicle's registration and insurance were issued to a person named Cohen. Borrego explained that, because of credit problems, he had been making monthly payments to Cohen for the truck.

¶4 As McSpaddin waited for the results of a records check on Borrego's license and registration, he asked Borrego several routine questions about his travels, posing follow-up questions to check for consistency. Borrego stated he had come from Tucson and was

going to Socorro, New Mexico. He further stated he worked as a wide-load escort and was scouting the route in order to move oil-field equipment between the two cities. McSpaddin testified he did not believe these locales were associated with the oil business. Moreover, the entire width of U.S. Highway 191 was about nine feet narrower than the equipment Borrego said he would be moving.

¶5 In addition, Borrego said he had driven into Tucson on the interstate, visited "the company that he was going to be hauling for[,] and then continued out of Tucson" without staying overnight. But Borrego could not provide the name, location, or any contact information for that company. He had then sought lodging in Safford, but when he was unable to find any accommodations there, he decided to proceed to New Mexico. Officer McSpaddin noticed that Borrego was nervous throughout the traffic stop, exhibiting "dry mouth, . . . shaky hands, [and] unsteadiness in his voice."

¶6 In the course of the stop, the officer also noticed an open map of Arizona on the passenger's seat, an air freshener in the vehicle, and luggage in the back seat of the truck. The bed of the truck was covered entirely with "a sliding tonneau cover." McSpaddin's testimony indicated that, given his training and experience, Borrego's use of an out-of-state vehicle, possession of odor-masking agents, inconsistent answers, and nervousness throughout the stop demonstrated he likely was involved in criminal activity. McSpaddin also testified that Tucson is a "source city," to which drugs are brought from Mexico and then distributed throughout the United States.

¶7 After issuing Borrego a citation for waste of finite resources, McSpaddin requested a drug-detection dog be brought to the scene. When DPS officers could not contact an on-duty canine unit, they requested assistance from an off-duty unit, which arrived within twenty minutes of receiving the call and within approximately one hour, in all, after Borrego received the citation. The dog then alerted on the bed of the truck, and the officers discovered 214 pounds of marijuana beneath the sliding cover.

¶8 The trial court denied Borrego's motion to suppress following an evidentiary hearing. Because Borrego had waived his right to a jury trial and agreed to submit the matter to the court based on the evidence presented at the hearing, the court subsequently found him guilty of possession and transportation of marijuana for sale. This appeal followed.

Discussion

Motion to Suppress

¶9 Borrego argues the trial court erred in denying his motion to suppress evidence obtained from his vehicle after the traffic stop because (1) the DPS officer did not have reasonable suspicion to detain him to await the arrival of a drug-detection dog and (2) the length of the detention was unreasonable.[1] When examining a suppression ruling, we review the trial court's factual findings for an abuse of discretion but review questions of law de novo. *See State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007).

[1]Because we conclude the officer had reasonable grounds to detain Borrego after the traffic stop, we need not address his alternative argument that his interaction with the officers was nonconsensual.

¶10 Law enforcement officers may detain a driver for investigative purposes if, based on the totality of the circumstances, they "have a particularized and objective basis for suspecting [the] person is engaged in criminal activity." *State v. O'Meara*, 198 Ariz. 294, ¶ 7, 9 P.3d 325, 326 (2000). In determining whether officers have reasonable suspicion for an investigative detention, a court must assess the surrounding circumstances in their entirety, looking at "the whole picture." *Id.* ¶ 9. In other words, a court may not single out and reject factors that, in isolation, may be viewed as potentially innocent. *Id.* ¶ 10. And a court will defer to a trained law enforcement officer's ability to distinguish innocent from suspicious behavior. *State v. Teagle*, 217 Ariz. 17, ¶ 26, 170 P.3d 266, 273 (App. 2007).

¶11 Here, the trial court found that Officer McSpaddin had reasonable and articulable grounds for believing Borrego was engaged in illegal activity based on the totality of the facts, which the court expressly stated as follows:

> A. Defendant's vagueness of where he was coming from.
>
> B. Defendant's vagueness of where he was traveling.
>
> C. Who defendant's contact in Tucson was.
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> D. Defendant's vehicle had Virginia plates.
>
> E. Defendant traveled from Virginia to Tucson, but defendant didn't stay in Tucson. Instead, he left Tucson and traveled to remote rural areas.
>
> F. Defendant could not indicate where in Tucson he had been.
>
> G. Defendant had luggage in the cab of the truck not in the covered bed of the truck.
>
> H. Defendant's nervous traits.

I. Vehicle registration and insurance were not in defendant's name.

J. Defendant's inconsistent answers to Officer McSpadd[i]n's questions.

K. Defendant was scouting to escort a 45 foot load on [a] narrow and winding road. Defendant would have already traveled on very narrow portion[s] of the road miles before the stop.

L. Defendant did not know the name of the company he was hired to scout for.

M. Defendant continued to be nervous after citation for waste of finite resources—a minor infraction.

N. Defendant's log receipts regarding mileage, gas, hotel room expenses, Western Union envelopes and transaction slips which also included: 1) Florida address for defendant rather than Virginia [as] was indicated; 2) Panama address.[2]

O. Defendant was scouting to haul [a] wide load of oil pipe/field equipment through [an] area not consistent with such equipment.

¶12 Given Borrego's nervous behavior and his inconsistent accounts of his travels and employment activities, we agree with the trial court that the officer had reasonable suspicion to detain Borrego for further investigation and to await the arrival of a drug-detection dog. Although Borrego illustrates in his brief that "a good many of the . . . Court's

[2]Officer McSpaddin found these items inside the passenger compartment of the truck in a limited search he conducted with Borrego's consent, before the dog arrived. Although Borrego apparently disputes that this search was consensual, he has not argued that these items were illegally obtained or improperly admitted; thus, we do not address the issue of whether he consented to the search of his truck's interior. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d 609, 616 (App. 2004) (argument not properly developed and supported by authority is waived on appeal).

findings are open to a variety of interpretations," when viewed together, as they must be, *see O'Meara*, 198 Ariz. 294, ¶ 10, 9 P.3d at 327, these circumstances created a particularized and objective basis for suspecting Borrego was engaged in criminal activity. Therefore, the investigative detention that followed was justified.

¶13 Borrego also argues "the detention was unconstitutionally long" given the duration of the wait for the drug-detection dog to arrive and the "urgency and diligence of the officer's [sic] collective efforts in getting a canine to the scene." To be constitutional, "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop[, and] . . . the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Florida v. Royer*, 460 U.S. 491, 500 (1983). Although there is no bright-line rule for how long officers may detain a motorist while waiting for the assistance of a canine, *see Teagle*, 217 Ariz. 17, ¶¶ 30-31, 170 P.3d at 274, "a significant factor . . . is how long it would reasonably take to find a drug-detection dog and transport it to defendant's location." *Id.* ¶ 34. Unless officers are dilatory in pursuing the investigation, a one-hour wait for a drug-detection dog is not necessarily an unreasonable period of time. *See id.* ¶¶ 32, 35.

¶14 The record shows, and both parties agree, that Borrego was detained for approximately one hour before the arrival of the canine unit.[3] Furthermore, the canine

[3]Although the trial court appears to have found the "length of [the] detention [was] approximately ninety minutes," this figure either incorrectly includes the time spent on the original traffic stop, *see Teagle*, 217 Ariz. 17, ¶¶ 8-9, 25, 30, 35, 170 P.3d at 270, 272, 274,

officer who responded testified he had been off duty when he was contacted, and he arrived on the scene within twenty minutes of receiving the call for assistance.[4] The trial court upheld the detention as reasonable, finding the officers collectively had acted with urgency and diligence in bringing the drug dog to the scene. Despite Borrego's claims that police could have secured investigative assistance more quickly, the trial court's finding was supported by the record and not clearly erroneous. *See State v. Rosengren*, 199 Ariz. 112, ¶ 9, 14 P.3d 303, 307 (App. 2000). We therefore affirm the court's denial of the motion to suppress.

Double Jeopardy

¶15 We also consider whether Borrego's convictions of both transportation and possession of marijuana for sale violate double jeopardy principles.[5] *See State v. Siddle*, 202 Ariz. 512, n.2, 47 P.3d 1150, 1153 n.2 (App. 2002) (double jeopardy violation constitutes fundamental error). We review de novo whether a defendant's double jeopardy rights have been violated. *See State v. Brown*, 217 Ariz. 617, ¶ 12, 177 P.3d 878, 882 (App. 2008). A defendant's double jeopardy rights are violated if he or she is convicted more than

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275 (separate detention occurs after traffic warning issued and motorist forced to wait for canine unit), or it is contrary to the record. The longest possible period Borrego could have been detained while waiting for the canine unit was seventy-one minutes, and the shortest period was fifty-three minutes.

[4]As noted, the officers had first attempted unsuccessfully to contact another, on-duty canine unit.

[5]We commend the state's professionalism in bringing this issue to the court's attention although doing so benefits its adversary in this proceeding.

once for the same offense, even if the defendant receives concurrent sentences for the convictions. *Id.* ¶ 13; *see Ball v. United States*, 470 U.S. 856, 864-65 (1985). For purposes of double jeopardy, two offenses are the same if they "have identical statutory elements or if one is a lesser included offense of the other." *Fitzgerald v. Superior Court*, 173 Ariz. 539, 544, 845 P.2d 465, 470 (App. 1992); *see also State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 11, 965 P.2d 94, 97 (App. 1998).

¶16 In *Chabolla-Hinojosa*, this court held that, when based on the same transaction, possession of marijuana for sale is a lesser included offense of transportation of marijuana for sale and, therefore, conviction of both offenses violates double jeopardy principles. 192 Ariz. 360, ¶¶ 13, 21, 965 P.2d at 97, 99. Because both convictions here were based on the same transaction, we vacate Borrego's conviction and sentence for possession of marijuana for sale. *See id.* ¶ 21 (when defendant convicted of lesser included offense in violation of double jeopardy, lesser offense vacated).

Conclusion

¶17 We affirm the trial court's denial of Borrego's motion to suppress. However, because his dual convictions violate the protection against double jeopardy, we vacate his conviction and sentence for possession of marijuana for sale.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

_____
PHILIP G. ESPINOSA, Judge

GARYE L. VÁSQUEZ, Judge